

**BUSINESS & LABOR**

EXHIBIT NO. 5
DATE 1-17-07
BILL NO. 5B 68

Montana Board of Investments
Dept of Commerce
2401 Colonial Drive, 3rd Floor
PO Box 200126
Helena, MT 59620-0126

Dear Carroll:

We and the industry would support legislation such as that is being proposed here. It acknowledges the need for confidential treatment of certain information which a venture fund may provide to its investors. That information, although potentially of interest to the investor to monitor the status and progress of its investment in a fund, may nevertheless contain trade secrets considered proprietary to a portfolio company in which the fund has invested. Such portfolio companies are almost always privately held. Disclosure of such proprietary information could damage the portfolio company, since it would reveal trade secrets to market competitors. Let me know if you need further elaboration.

Best regards,

A handwritten signature in black ink, appearing to read "MS", is written over a horizontal line.

Mark Solon
General Partner

Board of Investments Legislation Information Sheet

SB0068 – A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR CONFIDENTIALITY OF CERTAIN ALTERNATIVE INVESTMENT INFORMATION SUBMITTED TO THE BOARD OF INVESTMENTS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

The Montana Board of Investments has been investing in "alternative investments" since 1988. These investments are generally described as investments in a:

- private equity fund
- private real estate fund
- private venture capital fund
- private hedge fund
- private absolute return fund

The term "private" is used to distinguish these investments from investments in "public" securities, such as publicly traded stocks and bonds. These funds are managed by sophisticated General Partners and the Board invests as one of many Limited Partners. The Board invests in these funds to fulfill its legal mandate to invest pension funds under the "prudent expert principle", one criterion of which is to minimize risk and maximize return. Alternative investments, over the long term, generate higher returns than do investments in public equity and debt securities, while reducing overall pension portfolio volatility.

Because alternative investment managers invest in private companies and private real estate and exercise proprietary strategies for generating return, the ultimate success of these managers depends upon their ability to keep investment strategies and techniques confidential. Divulging detailed information on private companies or real estate transactions could potentially harm the companies and impair real estate transactions. Divulging return generating "investment strategies and techniques" could make those strategies available to competitors and lessen the effectiveness of such strategies. These proprietary investment strategies are not unlike copyrights or patents that are protected by law.

As long as the Limited Partners in alternative investments are private entities, there is little risk of sensitive or proprietary information being divulged. However, if the participants are public entities, such as the Board, this information could ultimately become accessible to the media, the public, and competitors under "right to know" laws. In fact, some states have been sued to produce this sensitive information. If there is a risk that this sensitive information could be divulged, thereby hurting all investors in the funds, alternative investment managers may refuse investments from public funds.

Several states have addressed this issue by enacting legislation such as SB68 that protects sensitive proprietary information, while making all other information available. This bill, patterned after recently-enacted California legislation, spells out in detail the information that is public and the information that is not. The sensitive information protected by the bill is regarded as "trade secrets" and protected under the state's Uniform Trades Secrets Act.

Alternative investment managers are not required by law or regulation to disclose financial information. They provide such information to their investors as part of the investors' evaluation of current and prospective investments in the fund. As an investor in these funds, the Board has a fiduciary responsibility to obtain and review this information, but also has a responsibility to keep this sensitive information confidential to prevent damage to the fund and its investors. This issue will become increasingly important to Montana as the Board invests in regional venture capital funds that will be considering investments in Montana businesses. Information considered **trade secrets** in SB68 is:

- due diligence materials that are proprietary to the board or the alternative investment manager, which would include the rationale for making individual portfolio investments;
- quarterly and annual financial statements of alternative investment funds;
- meeting materials of alternative investment managers;
- records containing information regarding the portfolio positions in which alternative investment funds invest;
- capital call and distribution notices; and
- alternative investment agreements and all related documents

Information is not considered **trade secrets** if the information:

- is already in the public domain;
- has already been publicly released by the board or the alternative investment manager;
- relates to the name, address, and vintage year of each alternative investment fund;
- is the dollar amount of:
 - the commitment made to each alternative investment fund by the board since the alternative investment fund's inception;
 - cash contributions made by the board to each alternative investment fund since the alternative investment fund's inception;
 - cash distributions received by the board from each alternative investment fund and recorded on a fiscal yearend basis;
 - cash distributions received by the board plus the remaining value of partnership assets attributable to the board's investment in each alternative investment fund and recorded on a fiscal yearend basis;
 - the total management fees and costs paid on a fiscal yearend basis by the board to each alternative investment fund; and
 - the cash profit received by the board from each alternative investment fund on a fiscal yearend basis;
- is the net internal rate of return of each alternative investment fund since the alternative investment fund's inception; or
- is the investment multiple of each alternative investment fund since the alternative investment fund's inception.

Uniform Trades Secrets Act Definitions

30-14-402. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(2) "Misappropriation" means:

(a) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) used improper means to acquire knowledge of the trade secret;

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(A) derived from or through a person who had utilized improper means to acquire it;

(B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.



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Jan 18, 2007

**Testimony in opposition to SB 68
From the Montana Newspaper Association**

Clarify confidentiality terms in private equity investments using public funds

Sen. Vicki Cocchiarella, Chairman
Committee Members
Senate Business, Labor and Economic Development
State Capitol
Helena, Montana 59601

I am John Barrows, Executive Director of the Montana Newspaper Association, representing Montana's 86 daily and weekly newspapers and I rise in opposition to Senate Bill 68.

Very few issues are as fraught with potentials for error and abuse as the handling of money by public institutions. We only need to look at the current shortfalls in the Public Employment Retirement funds and the struggles of state government to correct that shortfall to know that how funds are managed, and the risks of investment of public funds are very the concern of the public at large.

Senate Bill 68 recognizes the need for flexibility and the ability to make public fund investment more productive. Few would argue against that goal.

However, it does so at the cost of the constitutional right of the people to know how that money is being managed, particularly in the field of alternative investments... high risk investments that rely, to a large measure, on stealth in developing in their investment strategy.

This bill gives face play to the people's right to know, but in the end, sacrifices a great portion of to hopefully gain a greater rate of return through the use of alternative investments. In doing so it relies on expanding the concept of trade secrets. Trade secrets, however, are for the protection of the seller, not the buyer. They protect, through non-disclosure, what cannot be protected through a patent, or copyright.

While Montana law recognizes trade secrets, they are narrow, and probably most utilized in protecting inventions and software in high-tech situations.

SB 68, however, makes a substantial leap in expanding the use of trade secrets to hide public investment information that previously would have been open to the public's review. In doing so, it transfers the protection afforded to the public through Sections 8 and 9 of the Montana Constitution, to

know, observe and participate in the affairs of the government, to the rights of the investment company, which is the seller, to protect how it makes its investment.

This is becoming a wide-spread issue in states... driven by suits to open up information on such investments. If that makes them unavailable to public investment, then there is a reason for it... the protection of the public's money, or in the case of the retirement fund, obligations of the public to its employees, is of major importance... and one of the greatest protections we have is transparency of government actions.

And there is a difference... other states generally have the right to know granted to people through laws, Montana is unique in having it kept and reserved to the people themselves through its Constitution.

SB 68 essentially says to Montanans that in order to protect the right of the seller to hide its secrets, they must give up theirs to know what their government is doing for and to them in the case of these particular investments. The loss of available information under this bill is substantial. For instance, we would not even be able to know what the quarterly and annual financial statements are of the funds themselves, nor even the terms of the agreement itself.

We need only to look at the current condition of the Public Employee Retirement Fund to question the very idea of locking away from the public the information the Board of Investments receives in making its decisions. Alternative investments, while capable of large returns, are also fraught with large risks... and the use of the trade secret concept means that risk is removed from public view.

Although not specifically in the same category as alternative investments, last year's Coingate in Ohio, in which a large investment in rare coins by a government body went south is a case in point... especially when the revelation of the scandal came not from a government investigation, but from the digging and prodding of a newspaper, the Toledo Blade, after a long fight in court to make the information available.

Public money is in the public interest, and the loss of right to know in full how it is being spent, or invested, for the hopes of a better return, cannot be justified.

We strongly oppose this bill.